

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROY D. NEWPORT, *et. al.*,

Plaintiffs,

No. C 10-04511 WHA

v.

BURGER KING CORPORATION,

Defendant.

**ORDER GRANTING IN PART AND
DENYING IN PART BURGER
KING CORPORATION'S
MOTION TO DISMISS WILLIE C.
COOK'S CROSS-CLAIM AND
VACATING HEARING**

AND RELATED COUNTERCLAIMS.

INTRODUCTION

In this contract dispute, defendant Burger King Corporation moves to dismiss the action pursuant to FRCP 12(b)(6). For the reasons stated below, the motion is **GRANTED IN PART AND DENIED IN PART**.

STATEMENT

This action arises in the wake of the related class action settlement in *Castaneda v. Burger King Corp.*, No. C 08-04262 WHA, 2010 WL 2735091 (July 12, 2010). In *Castaneda*, a class of plaintiffs alleged that architectural barriers to access to certain California Burger King restaurants violated the Americans with Disabilities Act. Ten classes were certified — one for each of the ten individual restaurants where plaintiffs encountered alleged access barriers. These ten restaurants became known as the “Focus Ten.” Those parties entered a settlement agreement,

1 and BKC agreed to pay a total of \$7.5 million. BKC then looked to the owners and operators of
2 California Burger King franchises for indemnification (Compl. ¶ 4). A group of franchisees then
3 brought this suit against BKC requesting declaratory relief over the indemnity issue (*id.* at ¶ 90).
4 BKC counterclaimed, seeking indemnification from California Burger King franchisees
5 (Dkt. No. 90). Willie C. Cook was a newly added party named as a counterclaim defendant.

6 The instant motion, however, concerns Cook's cross-claims back against BKC. Cook was
7 a franchisee of Burger King 2055 in El Cerrito and Burger King 2288 in Oakland. BK #2055
8 and BK #2288 were two of the "Focus Ten" restaurants subject to the class certification order
9 in *Castaneda*. Cook was also franchisee of BK #3674, also located in Oakland. After signing
10 franchise agreements for all three locations, Cook assigned the franchise agreements and leases
11 to Huntington Restaurants, Inc., a corporation of which Cook was the sole shareholder
12 (Amd. Cross-claim ¶¶ 6–7, 9).

13 Between 2006 and 2008, Cook personally invested \$600,000 to make certain "re-imaging"
14 improvements to BK #2288 as required by the Burger King franchise agreement. Following the
15 *Castaneda* lawsuit, BKC sent consultants to survey BK #2288 and BK #2055. Cook was
16 instructed to implement changes to the locations in order to comply with ADA requirements.
17 These improvements cost another \$110,000 (*id.* at ¶¶ 23–29). The costs of the ADA repairs so
18 close on the heels of substantial "re-imaging" improvements — complicated by the worldwide
19 financial crisis of the fall of 2008 — left Cook in financial strain (*id.* at ¶¶ 31–32).

20 In March 2009, Cook decided to sell BK #3674, one of the two Oakland stores, which had
21 been underperforming. In the preceding months, Cook had been required to install a new dining
22 room at this location. He did so, but reduced the dining room size by 20-30 seats to better
23 facilitate management of the restaurant despite the fact that BKC had denied him permission to
24 make such reductions. Cook discussed his financial difficulties with BKC, but was denied
25 permission to close the restaurant. In March 2009, Cook received a letter from BKC terminating
26 his franchise for BK #3674 because Cook had not arranged the dining room as per BKC's
27 specification. Cook put the franchise on the market and sold it to John Mascali, a Caucasian.
28

1 He was permitted by BKC to continue operating the restaurant with the reduced-sized dining
2 room (*id.* at ¶¶ 34–36, 39).

3 The financial strain began to affect Cook’s health. In July 2009, he underwent triple
4 bypass heart surgery. Cook began to fall behind on his financial obligations to BKC, and owed
5 \$50,000 in past franchise fees by the end of 2009. BKC refused to negotiate regarding the
6 amount due (*id.* at ¶¶ 40, 42).

7 In December 2009, Cook was deposed in connection with the *Castaneda* litigation.
8 Only four days after his deposition testimony, Cook received a letter of notice of default, and
9 three days after that a termination notice. Later that month, HRI filed Chapter 11 bankruptcy
10 (*id.* at ¶¶ 43–44, 45). In July 2010, the *Castaneda* settlement allocated \$1.8 million to BK #2055
11 and BK #2288. That month, on the same day Cook’s wife of over 30 years died, BKC presented
12 him with a bill for \$1.8 million. Cook ultimately either sold or transferred his remaining
13 franchises (*id.* at ¶¶ 48–48, 52).

14 After the sale of all of his franchises, Cook “learned of other discriminatory treatment.”
15 BKC allegedly required Cook “to pay a substantial mark-up over that which BKC paid to the
16 owner of the leased property. Cook also learned that BKC has had a historical practice of
17 charging African-American franchisees a substantially higher mark-up on its leases than it
18 charges other non-black franchisees” (*id.* at ¶ 53).

19 After Cook was named as a party in BKC’s counterclaim, Cook brought a cross-claim
20 against BKC (Dkt. No. 151). Cook alleges seven claims for relief: (1) breach of the franchise
21 agreements; (2) declaratory relief under 28 U.S.C. 2201; (3) breach of the duty of good faith and
22 fair dealing with respect to BK #2055 and BK #2288; (4) breach of the duty of good faith and fair
23 dealing with respect to BK #3674; (5) intentional infliction of emotional distress; (6) negligence;
24 and (7) discrimination. This order follows full briefing.

25 ANALYSIS

26 To survive a motion to dismiss, a complaint must contain sufficient factual matter,
27 accepted as true, to state a claim for relief that is plausible on its face. FRCP 12(b)(6); *Ashcroft v.*
28 *Iqbal*, 129 S. Ct. 1937, 1949 (2009). A claim is facially plausible when there are sufficient

1 factual allegations to draw a reasonable inference that the defendants are liable for the misconduct
 2 alleged. While a court “must take all of the factual allegations in the complaint as true,” it is
 3 “not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* at 1949–50
 4 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “[C]onclusory allegations of law
 5 and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a
 6 claim.” *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) (citation omitted).

7 **1. STANDING.**

8 BKC moves to dismiss the claims alleging breach of contract and seeking declaratory
 9 relief because Cook lacks standing to bring the claims. BKC argues that because Cook assigned
 10 the franchise agreements for BK #2055 and BK #2288 to HRI, only HRI — not Cook, its sole
 11 shareholder — has standing to sue (Br. 5–6).

12 The “irreducible constitutional minimum of standing” contains three elements:
 13 (1) plaintiff must have suffered an injury in fact that is concrete and particularized, (2) there must
 14 be a causal connection between the injury and defendant’s conduct, and (3) it must be likely,
 15 as opposed to speculative, that the injury will be redressed by a favorable decision. *Lujan v.*
 16 *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

17 It is a well-established principle of corporate law that a shareholder cannot bring an
 18 individual direct claim for relief for an injury done to the corporation by a third party.
 19 *United States v. Stonehill*, 83 F.3d 1156, 1160 (9th Cir. 1996). A shareholder does have standing,
 20 however, when he has been “injured directly and independently of the corporation.”
 21 *RK Ventures v. City of Seattle*, 307 F.3d 1045, 1057 (9th Cir. 2002).

22 **A. Breach of the Franchise Agreement.**

23 Cook’s first claim is for breach of the franchise agreements. In order for Cook to have
 24 standing to bring this claim, he must demonstrate that he was injured independently of HRI as a
 25 result of the alleged breach of the franchise agreements.

26 Cook alleges that BKC’s failure to disclose “vital developments in disability access laws”
 27 violated the franchise agreement and prevented him from “successfully manag[ing] each of the
 28 subject franchises” (Amd. Cross-claim ¶ 61). Cook has indeed been injured independently of his

1 corporation by the alleged breaches of the franchise agreements. Following the \$7.5 million
2 *Castaneda* award, BKC brought a suit for indemnification, and named Willie C. Cook *personally*
3 as a counter-defendant, not his corporation HRI (Dkt. No. 90). As a result of the alleged breach,
4 Cook has “been forced to incur attorney’s fees to defend BKC’s indemnity and guaranty
5 demands” (Amd. Cross-claim ¶ 66).

6 Cook has thus been injured directly and independently of HRI. There is a demonstrated
7 causal connection between Cook’s injury and BKC’s alleged breach of the franchise agreements,
8 and it is likely that the injury would be redressed by a favorable judgment. Cook has thus
9 satisfied all three elements necessary to establish standing.

10 The only binding precedent cited by BKC is *Sherman v. British Leyland Motors, Ltd.*,
11 601 F.2d 429, 440–41 (9th Cir. 1979). *Sherman*, however, did not involve a factual situation
12 similar to the one involved here. In *Sherman*, the plaintiff never deviated from its corporate
13 identity, nor suffered any injury distinguishable from injury to the corporation. *Id.* at 439.
14 The situation here is distinguishable. Cook was named as an individual in BKC’s own suit for
15 indemnification. Cook thus has standing to assert a claim for breach of the franchise agreement.
16 Accordingly, BKC’s motion to dismiss the claim for breach of contract is **DENIED**.

17 **B. Declaratory Relief.**

18 Cook’s second claim is for declaratory relief under 28 U.S.C. 2201. Section 2201(a)
19 allows a court in a “case of real controversy” to “declare the rights and other legal relations of any
20 interested party seeking such declaration, whether or not further relief is or could be sought.”
21 Cook seeks a determination of the rights and obligations of the parties and requests the following
22 declarations: (1) BKC’s negligence was the basis for the *Castaneda* lawsuit; (2) BKC is not
23 entitled to indemnification from Cook if BKC was negligent or acted unlawfully, and (3) BKC is
24 not entitled to indemnification from Cook for attorneys fees or costs incurred in connection with
25 the *Castaneda* lawsuit.

26 BKC argues that Cook has no standing to request declaratory relief, reiterating its earlier
27 argument that Cook has no standing as an individual. Section 2201, however, allows “any
28 interested party” to seek declaratory relief. BKC itself named Cook *individually* as a party when

1 seeking indemnification, and now intends to hold him liable for \$1.8 million of the *Castaneda*
 2 award. Cook is undeniably an “interested party.” BKC’s motion to dismiss Cook’s claim for
 3 declaratory relief is **DENIED**.

4 **2. BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING.**

5 Cook alleges breach of the implied duty of good faith and fair dealing of all three
 6 franchise agreements. It is long recognized in California law that every contract contains an
 7 implied covenant of good faith and fair dealing that “neither party will do anything which will
 8 injure the right of the other to receive the benefits of the agreement.” *Wolf v. Walt Disney*
 9 *Pictures & Television*, 162 Cal. App. 4th 1107, 1120 (2008). The covenant, however, “is read
 10 into contracts in order to protect the express covenants or promises of the contract, not to protect
 11 some general public policy interest not directly tied to the contract’s purpose.” *Foley v.*
 12 *Interactive Data Corp.*, 47 Cal. 3d 654, 690 (Cal. 1988). There is thus no obligation to deal fairly
 13 or in good faith absent an existing contract. *Racine & Laramie, Ltd. v. Dep’t of Parks &*
 14 *Recreation*, 11 Cal App. 4th 1026, 1032 (1992).

15 **A. BK #2055 and BK #2288.**

16 Cook’s third claim is for breach of the duty of good faith and fair dealing pursuant to the
 17 franchise agreements for BK #2055 and BK #2288. He alleges that during negotiations, BKC
 18 “failed to disclose material facts” with the “intent to induce Cook to enter into the guaranty
 19 agreements containing guarantee provisions requiring him to indemnify BKC.” He alleges that if
 20 he had been aware of certain ADA obligations, “he would not have agreed to guarantee HRI’s
 21 agreement to indemnify BKC in disability access claims” (Amd. Cross-claim ¶ 66). The failure
 22 to disclose these facts, however, took place during the negotiation process, *not* while there was an
 23 existing contract between Cook and BKC. There is no pre-contract covenant of good faith and
 24 fair dealing in the negotiation process. *Copeland v. Baskin Robbins U.S.A.*, 96 Cal. App. 4th
 25 1251, 1259 (2002). In his opposition, Cook offers nothing in rebuttal of this argument. He has
 26 thus failed to state a claim on which relief can be granted pursuant to FRCP 12(b)(6).
 27 Accordingly, BKC’s motion to dismiss this claim is **GRANTED**.
 28

B. BK #3674.

Cook's fourth claim is for breach of the duty of good faith and fair dealing of the franchise agreement for BK #3674. Cook alleges that BKC breached this duty "by unreasonably refusing Cook's request to reduce the dining room only to later permit the subsequent franchisee to continue to operate the franchise with the reduced dining room" (Amd. Cross-claim ¶ 70). In December 2009, however, Cook transferred his interest in BK #3674 (Cook Exh. D). The transfer agreement specified that each of the "Owners, Guarantors, Assignors, and Assignees . . . unconditionally and absolutely releases and forever discharges BKC . . . against any and all claims . . . aris[ing] out of this Agreement, the Franchise Agreement, the operation of the Restaurant, or any other matter" (*id.* at 2). Cook is identified as the assignor of the transfer agreement (*id.* at 9). Cook thus released BKC from any claims arising out of the franchise agreement of BK #3674, and cannot state claim for breach of implied duty of good faith and fair dealing under this franchise agreement. Accordingly, BKC's motion to dismiss this claim is **GRANTED**.

3. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Cook's fifth claim is for intentional infliction of emotional distress. The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) plaintiff suffered severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by defendant's outrageous conduct. *Christensen v. Superior Court*, 54 Cal. 3d 868, 903 (Cal. 1991).

Cook alleges that BKC's extreme and outrageous behavior included pressuring him to make unnecessary improvements while he was undergoing heart surgery, retaliating against him for his deposition testimony in the *Castaneda* lawsuit by terminating his franchise agreements, refusing to negotiate with him, and demanding \$1.8 million on the same day that his wife of 30 years died. He also alleges that BKC's behavior caused him "to suffer financial loss, humiliation, mental anguish, and emotional and physical distress" (Amd. Cross-claim ¶¶ 80–81).

1 Cook has pled sufficient facts, if accepted as true, to state a claim for relief that is plausible on its
2 face. Accordingly, BKC's motion to dismiss Cook's fifth claim is **DENIED**.

3 **4. NEGLIGENCE.**

4 Cook's sixth claim is for negligence. The elements of negligence are duty, breach of duty,
5 causation, and damages. The general rule in California is that each person has a duty to use
6 "ordinary care" and is liable for injuries caused by a failure to exercise this care. *Parsons v.*
7 *Crown Disposal Co.*, 15 Cal. 4th 456, 472 (Cal. 1997).

8 Cook asserts that BKC owed him a duty of care, and "knew or should have known that
9 failure to exercise due care in its relationship with Cook would cause Cook severe emotional
10 distress" (Amd. Cross-claim ¶ 74–75). In support of this claim, Cook alleges the same
11 misconduct he offered in support of his intentional infliction of emotional distress claim,
12 including unnecessary pressure to renovate while he was having health problems and BKC's
13 demand of \$1.8 million on the same day his wife died.

14 BKC argues that the only injury Cook alleges is due to breach of contract, and thus
15 contract law should govern this claim, not tort law (Br. 11). Cook alleges BKC's actions outside
16 of termination of the franchise agreement were negligent. He also alleges that BKC breached its
17 duty of ordinary care and caused Cook emotional injury while he was ill and grieving after the
18 death of his wife. Cook has thus plead sufficient facts to state a claim for negligence.

19 BKC also argues that both tort claims are barred by the economic loss rule. The economic
20 loss rule precludes recovery under tort theories for losses that are solely economic in nature.
21 *Stop Loss Ins. Brokers, Inc. v. Brown & Toland Med. Grp.*, 143 Cal. 4th 1036, 1057 (Cal. 2006).
22 Cook, however, claims more than purely economic damages. He seeks recovery for
23 embarrassment, mental anguish, and emotional and physical distress. The economic loss
24 rule is thus inapplicable. Accordingly, BKC's motion to dismiss Cook's claim for negligence
25 is **DENIED**.

26 **5. DISCRIMINATION.**

27 Cook's seventh claim is for discrimination in violation of 42 U.S.C. 1981 and California
28 Civil Code Section 84. Section 1981 gives all persons within the United States the same right to

1 make and enforce contracts “as is enjoyed by white citizens.” Section 84 prohibits cancelling or
2 terminating a dealership agreement on the basis of race.

3 BKC argues that because it was released from liability for claims relating to BK #3674,
4 the claim for discrimination must fail. This order agrees. When signing the transfer agreement,
5 Cook released BKC from any claims arising out of “this Agreement, the Franchise Agreement,
6 the operation of the restaurant, or *any other matter*” (Cook Exh. D at 2) (emphasis added). Cook
7 thus released BKC from liability for any sort of claim arising from BK #3674. BKC’s motion to
8 dismiss the discrimination claim is **GRANTED**.

9 **CONCLUSION**

10 For the foregoing reasons, BKC’s motion to dismiss is **GRANTED IN PART AND DENIED IN**
11 **PART**. More specifically, BKC’s motion to dismiss Cook’s third, fourth, and seventh claims is
12 **GRANTED**. These claims are dismissed without leave to amend as they cannot be cured by
13 further factual pleading. BKC’s motion to dismiss Cook’s first, second, fifth, and sixth claims
14 is **DENIED**. The hearing set for October 13 is **VACATED**. BKC shall answer within
15 **FOURTEEN CALENDAR DAYS**.

16
17 **IT IS SO ORDERED.**

18
19 Dated: October 5, 2011.

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21 _____
22 WILLIAM ALSUP
23 UNITED STATES DISTRICT JUDGE
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